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No. 82-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

CASE:	Page
Hazel-Atlas Glass Co. v. *Hartford-Empire Co*, 322 U.S. 238 (1944), reversing 137 F.2d 764 (3d Cir. 1943)	2, 3, 5

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I.

Respondent Great Coastal would avoid review of the judgment below on the ground that "with regard to illegal secondary boycotting—the only subject or cause of action as to which verdict and judgment had been rendered against the Union—the Union did not show, and has never shown or purported to show, any falsity of evidence whatsoever." (Br. Opp. 6, see also *id.* 17, 18-19, 20-30).[1] The Court of Appeals, stating that this argument was "the principal point stressed in all of the company's submissions to this court" (A. 9a), firmly rejected it for two reasons: First, because the jury had been instructed that it could consider the evidence of

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[1] "Br. Opp." will refer to the Brief of Respondent in Opposition to Petition; "Pet." will refer to the Petition for a Writ of Certiorari, and "A." will refer to the Appendix to that Petition.

violence as part of the "totality of circumstances" in determining whether the IBT had engaged in illegal secondary boycotting activity the Court could not state that the jury's liability verdict could not have been affected thereby (A. 10, quoting the trial court's instructions.) Second, the court below stressed that Great Coastal's brief on IBT's appeal from the original judgment had "contained repeated references to the evidence of violence, with specific reference to the New Kent incident and sabotage of equipment" and had argued that the union's "illegal hot cargo and secondary boycott activity * * * *was inextricably tied in with the violence* * * *." (A. 11a, emphasis added).[2] The Court of Appeals recognized that it was "precluded from inquiring as to the materiality or effect" of Great Coastal's argument on its original decision affirming the judgment, because *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247, had held that a party which has "urged" fabricated evidence on a court is "in no position [thereafter] to dispute its effectiveness" (see A. 11a). The Court of Appeals' holding that Great Coastal's "fraud," though "reprehensible" (A.1a), did not constitute "fraud upon the court" rested on a restrictive interpretation of that concept, which our Petition shows is irreconcilable with *Hazel-Atlas* (Pet. 11-20), and conflicts with the view of the Ninth Circuit (Pet. 20-21).

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[2] See also Judge Butzner's dissenting opinion:

> To the district court's findings I need add only that Great Coastal persisted in its fraud when this court heard the union's appeal from the judgment awarding the company damages for the secondary boycott. *Contrary to its present position*, Great Coastal asserted in its brief that the secondary boycott activity "was inextricably tied in with violence . . . ." Great Coastal, however, did not reveal that this violence was self-inflicted. Instead, its brief relied on the perjured testimony of Seward and its other witnesses, and it embellished the appellate record with photographs of the truck that Seward, acting on orders of company officials, had damaged with a brick and bullets. [A. 29a, emphasis added]

The answer to Great Coastal's elaborate rhetorical question ("How can the Union now unequivocally assert to this Court that this secondary boycott judgment was 'fradulently obtained' * * *?", Br. Opp. 22) is twofold: As to IBT's request for relief on the theory that Great Coastal has committed fraud upon the court, the merits of Great Coastal's claim are simply irrelevant, as *Hazel-Atlas* holds, and the Court of Appeals recognized. And as to IBT's independent action in equity, it does not follow from the fact that there was sufficient evidence to go to the jury on the issues of liability and damages that the jury would have found against IBT in the absence of the perjury and fabricated evidence which Great Coastal put before it and which it was allowed to consider.[3] Absent that evidence the liability jury might have found in IBT's favor either on the ground that the ambulatory picketing at issue was primary rather than secondary or that IBT was not responsible therefor under the applicable common law rule of agency. (See Pet. 5, 24, which respondent chooses to ignore.) It is clear that the portion of the Court of Appeals' opinion quoted at pp. 23-24 of the Brief in Opposition rests not on a finding that the fabricated evidence did not affect the verdict, but on that Court's view of the requisites of an independent action in equity to set aside a judgment —specifically what it treats as the third element for identifying "extrinsic fraud" (see A. 18a-19a discussed at Pet. 24-25). Whether the Court of Appeals applied the correct standard in so ruling is the precise issue raised by the second question presented by the Petition (see Pet. 21-26.)

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[3] There is, of course, no basis for Great Coastal's assertion that its evidence of liability was "unchallenged" (Br. Opp. 30.) The District Court refused, at the original trial, to grant plaintiff's "motion" for a peremptory instruction on the issue of secondary boycotting and left it to the jury. (Tr. June 1972 at 710-711; see also Pet. 24, citing A. 83a-84a.)

II.

One would expect that a party which has been found guilty of a "fraud" which was "reprehensible" (A. 17a) in obtaining a judgment, would be particularly scrupulous in any further presentations to a court when the validity of that judgment is under attack. That, however, is not Great Coastal's approach. Rather, in the teeth of the District Court's findings of fact (A. 38a-46a) which were affirmed by the Court of Appeals (A. 7a, n.2), Great Coastal has compounded its established fraud by submitting to this Court a contrived version of the "evidence". While we shall not burden this Court with a point-by-point response, some of Great Coastal's misstatements should not remain unanswered:

(a) While Great Coastal asserts that there was "only one instance of falsity in the trial evidence" (Br. Opp. 7, 15) the trial court was "satisfied" and found "as a fact that much of the testimony offered by the plaintiff in the first trial dealing with the alleged acts of violence by the defendant was perjured" (A. 46a). Great Coastal refers only to the New Kent incident, ignoring the other acts of vandalism committed by its employees on its own property and that of its competitors who had hired strikers, and ignoring also its officers' "appreciation" as other trucks came in damaged (see the summary at Pet. 8, paragraphs 2 and 3). Even as to the New Kent incident, Great Coastal presents only a truncated description of the evidence it presented at the original trial: Great Coastal fails to mention that three witnesses testified about the New Kent incident, and that Great Coastal introduced numerous photographs of Seward's tractor and trailer showing a smashed windshield and several bullet holes.

(b) While Great Coastal attempts to play down the role and status of William Funai (Br. Opp. 7, 8, 9, 12) the trial court found that Robert Seward threw a brick through the windshield of his truck and fired three shots

into the trailer as "instructed" by Funai (A. 41a) who "was a key managerial employee who had direct supervision over the drivers, with the right to hire and fire" them, and who in turn took his instructions directly from the president and owner of Great Coastal, Estes, to whom he "routinely reported any damage of Great Coastal equipment" (A. 40a, 39a).

(c) While Great Coastal takes exception to our reference "to the Company's 'sealing the silence of the perpetrators' of the false evidence against the Union 'through payoffs'" (Br. Opp. 12), we merely paraphrased Judge Butzner, who observed that, "[L]ike the litigant in *Hazel-Atlas*, [Great Coastal] later attempted to forever seal its deception by the payment of large sums of money to the participants in its fraudulent scheme." (A. 33a). This characterization is fully justified by the findings below. Great Coastal challenges the majority opinion's description of its bribery (A. 8a) by arguing that those to whom it made payments after it had obtained the judgment were entitled thereto under its profit-sharing plan. This argument, too, defies the findings. The trial court found it to be "the company policy that a manager on profit-sharing must have been with Great Coastal at the time of recovery against the IBT." (A. 46a). Moreover, the payment to Flinn, relied on at Br. Opp. 14, is but another instance of the bribery, since Flinn, far from being innocent "of improper action or conduct against the Union" (*id.*), was found to have covered up the truth (A. 43a).

(d) Most important, the very phrase "false evidence" which Great Coastal repeatedly uses, is materially misleading. Great Coastal did far more than present "false evidence" to the jury, the trial court and the Court of Appeals. It "fabricated" that evidence (A. 7a) and paid bribes to reward and conceal its misconduct (A. 8a). In Judge Butzner's words:

> [Great Coastal's] fraud was no isolated instance of perjury. To achieve their purposes, the officers and

> employees created spurious evidence, deceived the Virginia State Police, answered interrogatories under oath untruthfully, filed false affidavits and gave perjured testimony in administrative and judicial proceedings, introduced fabricated exhibits, and filed a corrupt brief and appendix on appeal. [A. 33a]

In sum, Great Coastal obtained a sizable judgment by a "deliberately planned and executed scheme to defraud." (*Hazel-Atlas*, 322 U.S. at 245). It thereby committed a wrong not only against the petitioner but "against the institutions set up to protect and safeguard the public" (*id.* at 246). In this Court, Great Coastal offers an argument which was thoroughly discredited below and misrepresents the record in this proceeding; but its brief refuses to address any of the grounds for review urged in the Petition for Certiorari. To allow Great Coastal to retain the fruits of its wrongdoing would, we submit, demean "the integrity of the judicial process."

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and in this Reply Memorandum, the Petition should be granted.

Respectfully submitted,

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